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Counsel for USACM Liquidating Trust

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:
USA COMMERCIAL MORTGAGE COMPANY,

Debtor.

In re:
USA CAPITAL REALTY ADVISORS, LLC,

Debtor.

In re:
USA CAPITAL DIVERSIFIED TRUST DEED FUND,
LLC,

Debtor.

In re:
USA CAPITAL FIRST TRUST DEED FUND, LLC,

Debtor.

In re:
USA SECURITIES, LLC,

Debtor.

Affects:
☒ All Debtors
☐ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case Nos.:
BK-S-06-10725-LBR
BK-S-06-10726-LBR
BK-S-06-10727-LBR
BK-S-06-10728-LBR
BK-S-06-10729-LBR

JOINTLY ADMINISTERED
Chapter 11 Cases

Judge Linda B. Riegler

**ERRATA TO APPLICATION
TO COMPROMISE AND
SETTLE CONTROVERSIES
WITH BEADLE, MCBRIDE,
EVANS & REEVES, LLP, ET
AL.**

Hearing Date: November 18, 2008
Hearing Time: 9:30 a.m.

1 USACM LIQUIDATING TRUST; and
2 USA CAPITAL DIVERSIFIED TRUST DEED FUND,
3 LLC;

4 Plaintiffs,

5 v.

6 BEADLE, MCBRIDE, EVANS & REEVES, LLP,
7 REEVES, EVANS, MCBRIDE & ZHANG, LLP, TG
8 MCBRIDE CPA LTD., and T. GARTH MCBRIDE,

9 Defendants.

10 Geoffrey Berman (“Berman” or the “Trustee”), Trustee of the USACM Liquidating
11 Trust (the “USACM Trust”) and Michael Tucker (“Tucker” or the “Manager”), Manager
12 of the USA Capital Diversified Trust Deed Fund, LLC (“DTDF”), hereby file this Errata to
13 the Application to Compromise and Settle Controversies With Beadle, McBride, Evans & Reeves,
14 LLP, *et al.* (the “BMER Compromise Application”) filed on October 20, 2008 as Docket Entry
15 6573. The BMER Compromise Application was filed without Exhibit D attached.

16 A true and correct copy of Exhibit D to the BMER Compromise Application is attached
17 hereto, and is hereby incorporated in the BMER Compromise Application by this reference.
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Dated: October 21, 2008

DIAMOND MCCARTHY LLP By: <u>/s/ Allan B. Diamond</u> Allan B. Diamond, TX 05801800 (pro hac vice) J. Maxwell Beatty, TX 24051740 (pro hac vice) 909 Fannin, Suite 1500 Houston, Texas 77010 (713) 333-5100 (telephone) (713) 333-5199 (facsimile) <i>Special Litigation Counsel for USACM Liquidating Trust</i>	DIAMOND MCCARTHY LLP By: <u>/s/ Eric D. Madden</u> William T. Reid, IV, TX 00788817 (pro hac vice) Eric D. Madden, TX 24013079 (pro hac vice) P. Jason Collins, TX 24040711 (pro hac vice pending) 6504 Bridge Point Parkway Suite 400 Austin, Texas 78730 (512) 617-5200 (telephone) (512) 617-5299 (facsimile) <i>Special Litigation Counsel for USACM Liquidating Trust</i>
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EXHIBIT D

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In re:
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In re:
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**TUCKER DECLARATION IN SUPPORT OF
SETTLEMENT WITH BMER**

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EXHIBIT D

1 USACM LIQUIDATING TRUST; and
2 USA CAPITAL DIVERSIFIED TRUST DEED FUND,
3 LLC;

4 Plaintiffs,

5 v.

6 BEADLE, MCBRIDE, EVANS & REEVES, LLP,
7 REEVES, EVANS, MCBRIDE & ZHANG, LLP, TG
8 MCBRIDE CPA LTD., and T. GARTH MCBRIDE,

9 Defendants.

10 **DECLARATION OF MICHAEL TUCKER IN SUPPORT OF MOTION TO APPROVE**
11 **SETTLEMENT – BMER**

12 Michael Tucker, Manager of USA Capital Diversified Trust Deed Fund, LLC (“DTDF”),
13 hereby declares the following under penalty of perjury:

14 1. I am the Manager of DTDF pursuant to the Third Amended Joint Chapter 11 Plan
15 of Reorganization (the “Joint Plan”) filed by DTDF, USA Commercial Mortgage Company
16 (“USACM”), USA Capital Realty Advisors, USA Capital First Trust Deed Fund, LLC
17 (“FTDF”), and USA Securities, LLC (collectively, the “Debtors”). The plan was confirmed by
18 order of this Court on January 8, 2007 and became effective on March 12, 2007.

19 2. Pursuant to the Joint Plan and Confirmation Order, post-effective date DTDF
20 expressly retained DTDF’s causes of action, including the Litigation Claims as defined in the
21 Joint Plan. This Court retained jurisdiction in Section VIII. D of the Joint Plan over numerous
22 matters, including “[h]earing and determining any and all adversary proceedings, motions,
23 applications, requests for disgorgement and contested or litigated matters arising out of, arising
under or related to the Chapter 11 Cases, including with out limitation the Litigation Claims and
the Non-Debtor Insider Litigation” and “[a]pproving compromises and settlements under Rule
9019 of the Bankruptcy Rules to the extent required under or included in the plan.”

1 3. After I was appointed as DTDF's Manager, I authorized an extensive
2 investigation as to the factual circumstances that led to DTDF's bankruptcy. During the course
3 of this investigation, I discovered facts that give rise to litigation claims against Beadle,
4 McBride, Evans & Reeves, LLP, Reeves, Evans, McBride & Zhang, LLP, TG McBride CPA
5 Ltd., and T. Garth McBride (collectively, "BMER") related to its audits of DTDF's financial
6 statements. I believe that BMER failed to conduct its audits of DTDF in accordance with
7 contractual and professional standards. This allowed certain insiders to perpetrate a financial
8 fraud on USACM, DTDF, and other related entities, thereby leading to the loss of tens of
9 millions of dollars. Furthermore, I believe that BMER failed to appropriately audit the financial
10 statements of FTDF, thereby causing the loss of substantial sums of money due to defaulting
11 loans. As a result of these findings, the USACM Liquidating Trust (the "USACM Trust") and
12 DTDF filed a civil complaint against BMER in the United States Bankruptcy Court District of
13 Nevada, Adversary No. 08-1164 on May 16, 2008.

14 4. DTDF and BMER participated in informal settlement discussions in May 2008
15 related to these claims, but did not immediately result in a compromise of DTDF's claims against
16 BMER. However, DTDF and BMER continued to discuss settlement for the period following
17 that meeting. After extensive discussions, meetings, and arms-length settlement negotiations,
18 USACM, DTDF, and BMER ultimately arrived at a settlement agreement in July 2008. This
19 agreement was memorialized in the Settlement Agreement, Mutual Release, and Covenants that
20 was entered into between the USACM Trust, DTDF, and BMER (the "Settlement Agreement").

21 5. I, along with Special Litigation Counsel, have analyzed DTDF's claims against
22 BMER and the Settlement Agreement. It is my considered judgment that the Settlement
23 Agreement with BMER and the proposed settlement set forth therein are fair, reasonable, and in

1 the best interests of DTDF for the reasons set forth below. I have entered into the settlement
2 agreement with BMER in good faith after weighing what I believe to be all relevant and
3 material factors, including but not limited to the amount of the proposed settlement; the strengths
4 of the asserted claims and defenses; the costs and burdens of litigation of the claims to judgment,
5 including expert witness costs; the effect of such litigation on DTDF's litigation against other
6 parties; the insurance policy limits and insurance funds available to BMER to pay the claims
7 now and in the future and other potential sources of payment by BMER of the claims now and in
8 the future; and the general uncertainty involved in litigation of the claims.

9 **BMER CLAIMS**

10 6. DTDF's claims are for accounting malpractice/professional negligence and breach
11 of contract related to services provided to DTDF. BMER audited DTDF's financial statements
12 for the fiscal years ending in December 31, 2000 through December 31, 2003. For the fiscal
13 years 2001 through 2002, BMER issued unqualified audit opinions on DTDF's financial
14 statements. BMER continued work on DTDF's 2003 financial statements through October of
15 2004, when BMER was informed DTDF no longer required audit services.

16 7. I believe that DTDF's claims against BMER have substantial merit and that
17 BMER bears substantial responsibility for DTDF's losses. I have been advised that counsel for
18 BMER has strongly denied the validity of any such claims and any potential liability to DTDF.
19 In assessing the appropriate settlement in this matter, I have taken into account BMER's
20 assertions that the problems encountered in the audit were caused by USACM management and
21 employees; and that the accuracy of the financial statements was the responsibility of
22 management and not BMER.

1 8. The case filed against BMER is complex, and will be expensive for both DTDF
2 and BMER to litigate. I am also aware that the outcome of the case, like any other litigation
3 outcome, is inherently uncertain and subject to risk.

4 9. DTDF's attorneys and BMER's attorneys agreed to informal settlement
5 discussions in an effort to resolve the claims, with my full knowledge and consent. Further
6 discussion and negotiations between counsel for DTDF and counsel for BMER ensued over the
7 period that followed. The parties explored the merits of the claims and defenses, and the
8 complexity, expense, and unpredictability of the litigation of the claims against BMER. DTDF
9 and BMER entered into a settlement with respect to DTDF's claims against BMER. The terms
10 and conditions of the proposed settlement are set forth in the Settlement Agreement. DTDF will
11 share in this settlement as a beneficiary of the USACM Trust and as otherwise outlined in the
12 agreement between the USACM Trust and DTDF dated and filed with the Court on March 13,
13 2008.

14 10. The proposed settlement agreement with BMER, in my judgment, is reasonable,
15 fair, and in the interest of DTDF. The amount of the settlement is substantial in light of the
16 current stage of the case, BMER's insurance policy limits, the complexity, expense, and the risks
17 and uncertainty of litigation. I have entered into the proposed settlement in good faith, and there
18 has been no collusion or other improper conduct in connection with this proposed settlement to
19 my knowledge.

20 11. In assessing the appropriate settlement in this matter, I have also taken into
21 account that litigation against BMER at this time would present additional expense to DTDF. I
22 am not convinced that BMER has the financial capability, through insurance or otherwise, to pay
23 a judgment that DTDF would be likely to recover against it on the relevant claims. In connection

1 with the settlement negotiations, BMER's insurance carrier has strongly asserted that there are
2 meritorious coverage defenses under the relevant insurance policies that may make all or some of
3 the policy proceeds unavailable to pay any judgment DTDF may recover against BMER. This
4 settlement is significant relative to the total amount of coverage BMER has available for DTDF's
5 claims. Additionally, the settlement nearly exhausts BMER's available insurance coverage, and
6 in light of potential coverage defenses, I believe it to be reasonable.

7 12. In addition, continued litigation of DTDF's claims against BMER would be
8 complex, expensive, time-consuming, and the outcome of any such litigation would inherently
9 be uncertain. Any litigation of this claim would involve substantial costs related to discovery
10 alone as there are millions of pages of documents related to this claim, many witnesses that
11 would need to be deposed, and the claims would require the retention of multiple expert
12 witnesses.

13 13. There is a substantial benefit to DTDF from resolving the claims against BMER
14 now, without the necessity of continued litigation. I believe that the settlement amount is within
15 the reasonable range of likely outcomes from litigation in light of issues related to the ultimate
16 collectibility of any judgment against BMER. In light of all of the relevant factors, the proposed
17 settlement with BMER is reasonable, fair and in the best interests of DTDF and will facilitate a
18 prompt and meaningful recovery to DTDF and its interest holders. I have entered into the
19 Settlement Agreement in good faith, and there has been no collusion or other improper conduct
20 relating to the proposed settlement with BMER to my knowledge.

21 **PROTECTION AGAINST THIRD-PARTY CLAIMS**

22 14. During the negotiations with BMER, the protection of BMER against the
23 possibility of claims for contribution or indemnity was a significant issue. BMER wants

1 reasonable assurance that they will not be subject to such further claims and litigation arising
2 from many of the same events. Such claims for contribution or indemnity could conceivably be
3 asserted by current defendants in other cases related to the Debtors' bankruptcy, although none
4 have in fact been asserted to date.

5 15. Entry of an appropriate order protecting BMER against the possibility of future
6 claims for contribution or indemnity will be of benefit to DTDF, and will serve the purposes of
7 the Joint Plan by facilitating a recovery from PBTK for the benefit of the beneficiaries of DTDF
8 who have suffered loss as a result of the events leading to the Debtors' bankruptcy.

9
10 I DECLARE under penalty of perjury that the foregoing is true and correct and that this
11 declaration was executed on October 20, 2008.

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14 Michael Tucker, Manager of USA
15 Capital Diversified Trust Deed Fund, LLC
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